

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
)
Petition of the United Power Line Council) WC Docket No. 06-10
For a Declaratory Ruling Regarding The)
Classification of Broadband Over Power)
Line Internet Access Service As An)
Information Service)

COMMENTS OF COMPTTEL

COMPTTEL, by its attorney, hereby respectfully responds to the Federal Communications Commission’s (Commission) request for comment on the above-captioned petition.¹ In its petition, the United Power Line Council (UPLC) asks the Commission to issue a declaratory ruling that broadband over powerline (BPL) services are “interstate information services.”² As set out in greater detail below, COMPTTEL believes that it would be inappropriate for the Commission to grant the wide-sweeping relief

¹ COMPTTEL is the leading industry association representing communications service providers and their supplier partners. Based in Washington, D.C., COMPTTEL advances its member’s business through policy advocacy and through education, networking and trade shows. COMPTTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. COMPTTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTTEL members share a common objective: advancing communications through innovation and open networks.

² UPLC Petition at 4.

requested by the UPLC.³ At the same time, UPLC raises important policy questions in its petition, and the Commission should issue a Notice of Inquiry (NOI) regarding the appropriate regulatory classification of BPL services. Such an NOI would allow the Commission to develop a complete record regarding the way in which BPL services are offered to the public by various providers, the implications of classifying BPL services as information services, and whether there are certain rules or statutory requirements that are properly addressed by the Commission's forbearance authority.

UPLC argues that the Commission's classification of cable modem service and digital subscriber line (DSL) service as information services should be extended to BPL.⁴ More specifically, UPLC contends that classifying BPL as an information service "will remove any regulatory uncertainty which could discourage investment in and deployment of BPL systems."⁵ In support of that contention, UPLC argues that BPL "inextricably intertwines information processing and data transmission into a seamless service offering" that must be classified as an information service.⁶ Without citing any specific examples, UPLC claims that BPL "could face

³ COMPTTEL notes at the outset that it disagrees with the Commission's decisions regarding the classification of wireline broadband Internet access services and cable modem services. To the extent that COMPTTEL discusses in these comments the conclusions reached in those proceedings, it is only to put the instant petition in context, and not to endorse the Commission's prior holdings.

⁴ UPLC Petition at 4.

⁵ *Id.* at 5.

⁶ *Id.* at 4-5.

conflicting and complex regulatory requirements” in the absence of action on its petition.⁷

It is entirely unclear from UPLC’s petition what specific regulatory compunctions BPL services would be subjected to in the absence of classification as an information service. UPLC does not discuss the statutory provisions of Title II or the Commission’s implementing rules that would impose “conflicting and complex” regulation on such services.⁸ More importantly, the petition does not explain what provisions of Title II that UPLC believes apply to BPL services today, nor does it explain what provisions of the Commission’s rules would apply were BPL classified as an information service. Instead, UPLC appears to advocate a sort of regulatory vacuum for BPL services.⁹ The Commission has previously found such failure to sufficiently plead the need for, and the impact of, such wide sweeping relief to be insufficient grounds for granting such a request.¹⁰ The Commission must reach the same conclusion here.

⁷ *Id.* at 9.

⁸ *Id.*

⁹ The Commission has not, and thus far does not appear poised to, adopt any consumer protection or competition rules related to the provision of broadband information services. *See* “No Action Needed Now on Net Neutrality-FCC chief,” Reuters, Dec. 14, 2005 (“I’m hesitant to adopt rules that would prevent anti-competitive behavior where there hasn’t been significant evidence of a problem,” Martin said at a conference luncheon by Comptel, a group representing competitive telephone carriers.”).

¹⁰ *See In the Matter of Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket No. 04-29, FCC 05-95, at ¶ 4 (“SBC thus acknowledges, in its forbearance petition as well as its petition for declaratory ruling, that the Commission has not yet decided the extent to which IP-enabled services are covered by Title II and its implementing rules.”).

The Commission has not had any opportunity to explore the vitally important consumer protection and competition provisions of Title II and the Commission's implementing rules that would be eliminated as to BPL if the relief requested by UPLC were granted. Title II of the Communications Act, as amended, obligates telecommunications carriers to abide by numerous requirements that the Commission has repeatedly found are vital to the protection of consumers.¹¹ Because these protections are tied to the provision of a telecommunications service, classification of BPL as an information service without first adopting safeguards to replace those vital Title II protections would leave consumers unguarded. The Commission has also included BPL providers in its recent broad-sweeping order applying the requirements of the Communications Assistance for Law Enforcement Act (CALEA).¹² Although it is not clear from the Commission's order, it appears as if the Commission's conclusions related to CALEA and BPL were based on BPL's classification as a telecommunications service, so the Commission cannot grant the requested information services declaration without

¹¹ See 47 U.S.C. § 222 (customer proprietary network information); 47 U.S.C. § 258, 47 CFR § 64.1140 (slamming); 47 CFR § 64.2401 (truth-in-billing); 47 CFR § 63.100(a)-(e) (network outage reporting) 47 U.S.C. § 214, 47 CFR §§ 63.60 *et seq.* (service discontinuance); 47 U.S.C. § 254(g) (rate averaging); and 47 U.S.C. § 253(b) (permitting state authorities to adopt requirements necessary to "protect the public safety and welfare). Before the FCC adopted the *Wireline Broadband Internet Access Order*, there was no question that these provisions all applied to wireline broadband services.

¹² *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, FCC 05-153, at ¶ 35 n.98 ("Based on our analysis here, we decline to exclude any facilities-based broadband Internet access providers from CALEA requirements at this time.").

impacting law enforcement's access to BPL services. In short, the Commission should explore the full impact of regulatory classification of BPL services, and it cannot simply declare such services to be information services without developing a complete record.

It is not at all clear from UPLC's petition that the primary basis for the requested relief – the argument that the current regulatory treatment of BPL services is hindering deployment – is actually proved anywhere in the marketplace. Indeed, UPLC's argument that regulatory classification issues are hindering the deployment of BPL is a reversal from the position UPLC took in its comments to the Commission in its BPL Inquiry. In that proceeding, UPLC said that utility business practices – not regulatory issues – were the explanation for slow BPL deployment.¹³ It appears that, even since the time that UPLC filed its comments with the Commission, commercial viability, not regulatory requirements, continues to be the principal impediment to the widespread deployment of BPL services.¹⁴ In any event, the Commission cannot grant the substantial relief requested in

¹³ Comments of UPLC, ET Docket No. 03-104, at 7 (filed July 7, 2003) (“Conversely, there are many reasons that might discourage utilities from deploying BPL. First, this is a difficult time for utilities to be starting a new business – any business, let alone a communications business. Second, there is an added level of risk inherent in any new technology such as BPL. Third, and probably most important, electric utilities which are regulated by the state utility commissions and by the Federal Energy Commission tend to be conservative in their investments, have unique operating concerns and must be very careful about equipment that attaches to live electric wires.”).

¹⁴ See “Idacomm Ending BPL Efforts; Commercial Viability Seen As Far Off,” National Journal Technology Daily, January 31, 2006.

UPLC’s petition without further exploration of the unsupported assertion that regulatory issues are slowing deployment of BPL services.¹⁵

UPLC offers nothing more than a conclusory assertion in its petition that a declaratory ruling that BPL services are information services is “appropriate.”¹⁶ The Commission has never examined the proper regulatory classification of BPL services. Although UPLC contends that the record developed in the Commission’s BPL Inquiry is “extensive” and sufficient to justify the declaratory ruling UPLC now requests, UPLC concedes – as it must – that the “focus was on technical rules for BPL operations” in the Commission’s BPL inquiry, and that issues related to regulatory classification were beyond the scope of that proceeding.¹⁷ Indeed, it is particularly odd that UPLC now urges the Commission to rely on the record developed in the BPL NOI in the instant proceeding as justification for the relief requested, when UPLC argued to the Commission in the BPL NOI that policy issues were beyond the scope of the proceeding and were not included

¹⁵ Certainly the Commission has never found any regulatory impediments to BPL deployment, and indeed has relied on its findings that BPL is a strong competitor to other broadband providers as justification for elimination of numerous local competition provisions of its rules. *See, e.g. In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, FCC 05-150 (2005) at ¶ 50 and n.139 (citing availability of BPL services as justification for eliminating common carrier regulation of Bell broadband services).

¹⁶ UPLC Petition at 9.

¹⁷ *Inquiry Regarding Carrier Current Systems, including Broadband Over Power Line Systems*, Notice of Inquiry, ET Docket No. 03-104 (2003). *See also Carrier Current Systems, including Broadband over Power Line Systems and Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems*, Notice of Proposed Rulemaking, ET Docket Nos. 03-104 and 04-37 (2004).

in the record.¹⁸ Indeed, UPLC argued that the only role for the Commission to play in BPL deployment was a technical role, claiming that “[w]hether utilities offer commercial services will be determined in large part by the technical rules that the FCC adopts for BPL.”¹⁹ When the Commission again sought comment on BPL issues in 2004, UPLC again made no mention of regulatory classification issues.²⁰ In the face of those prior statements to the Commission, UPLC does not in its instant petition explain what, if any, regulatory issues have arisen since its prior filings with the Commission that now threaten the deployment of BPL services.

In addition, UPLC’s petition fails to explain, as a factual matter, what specific services it seeks to have classified as information services. It is clear, for example, that some BPL services are offered to consumers by Internet Service Providers (ISPs), in which case utilities are offering a common carrier service to those ISPs, and not an information service.²¹ As the D.C. Circuit has explained, “[i]t is not an obstacle to common carrier status that [a carrier] offers a service that may be of practical use to only a fraction of the

¹⁸ Reply Comments of UPLC, ET Docket No. 03-104, at 13 (filed Aug. 20, 2003) (“The Commission consciously decided not to visit broad policy issues concerning BPL systems in this proceeding. Among the policy issues that were considered -- but not raised in the NOI -- were pole attachments, affiliate transactions, and universal service. Nonetheless, some parties can’t take a hint. Therefore, the Commission should ignore comments that address these issues.”).

¹⁹ Comments of UPLC, ET Docket No. 03-104, at 7.

²⁰ Comments of UPLC, ET Docket No. 04-27.

²¹ *See, e.g.*, “Progress Energy And Earthlink Testing Broadband Over Power Lines With Area Customers,” Press Release, Feb. 18, 2004, available at http://www.earthlink.net/about/press/pr_progress_energy/.

population. . . . The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use.”²² If BPL providers are indeed offering service on a common carrier basis, they are not information service providers, and the relief requested in the instant petition would be unavailable.

According to the Commission’s *Wireline Broadband Internet Access Order* and to the Supreme Court’s decision in *Brand X*,²³ the issue presented with respect to the proper classification of the transmission underlying Internet access service is a factual one. In *Brand X*, the court determined that:

The entire question is whether the products here are functionally integrated (like the components of a car) or functionally separate (like pets and leashes). That question turns not on the language of the Act, but on the factual particulars of how Internet technology works and how it is provided, questions Chevron leaves to the Commission to resolve in the first instance.²⁴

Notwithstanding the Court’s clear holding regarding the factual basis for its determination, in its petition, UPLC asserts, without any factual support, that BPL service “inextricably intertwines information processing and data

²² *Nat’l Assoc. of Reg. Comm’rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976).

²³ *National Cable & Telecomms. Ass’n v. Brand X*, 125 S.Ct. 2688 (2005). CompTel believes that the Communications Act as a legal matter necessarily provides that the transmission component underlying an Internet access service that is offered to the public for a fee is a telecommunications service.

²⁴ *Brand X*, 125 S.Ct at 2705.

transmission into a seamless service offering.”²⁵ But public accounts of BPL trial deployments suggest that exactly the opposite is true: BPL providers are separating out transmission services by, for example, selling transmission to an ISP that, in turn, sells service to an end user. As such, BPL would not be entitled to classification as an information service on the grounds affirmed by the Supreme Court in *Brand X*.

UPLC in its petition places much reliance on the *Brand X* decision. But at the most fundamental level, any Commission reliance on *Brand X* in the context of BPL would be misplaced, because the Supreme Court expressly disclaimed any effect that its ruling on cable modem service might have on wireline services, stating that “we express no view on how the Commission should, or lawfully may, classify DSL service.”²⁶ Such a holding is equally applicable to BPL services. Moreover, the Court with respect to the merits of the case ultimately answered only a factual question, not a legal question.²⁷ Even with respect to that limited question, the Court did not find that the Commission was correct, but only that its factual determination was “reasonable” on the record before it.²⁸ Because the Commission has undertaken no such factual analysis of BPL services, and indeed has no record before it to do so, only a subsequent Notice of Inquiry, issued in order

²⁵ UPLC Petition at 4-5.

²⁶ *Brand X*, 125 S.Ct. at 2711.

²⁷ *Id.* at 2705.

²⁸ *Id.* at 2710.

to develop such a record, could form the initial basis for an analysis of the proper regulatory classification of BPL services.

It is also clear that the rapid deployment of BPL would be hindered, not helped, by the Commission's classification of such services as information services. BPL providers will need to interconnect with other communications networks in order to facilitate the exchange of traffic between BPL users and users and services on other networks. Only telecommunications carriers are entitled to the compulsory interconnection rights of Title II of the Communications Act.²⁹ As such, were the Commission to grant the request of UPLC that all BPL services be classified as information services, and thus outside of Title II, BPL providers would lose the ability to obtain interconnection with other networks.

Finally, the Commission cannot simply remove BPL from all of the provisions of Title II of Act and then hope that additional authority can be found in the future to address any consumer or competition harms that may arise. Since the Commission adopted the *Wireline Broadband Internet Access Order*, in which it purported to rely on Title I as a backstop should additional regulation be needed, the Commission's Title I authority has been called into serious question by the D.C. Circuit.³⁰ Indeed, having removed

²⁹ 47 U.S.C. § 251(a).

³⁰ See *American Library Assoc. v. Motion Picture Assoc. of America*, No. 04-1037, at 18 (D.C. Cir. 2005) (rejecting Commission exercise of Title I authority as “*ultra vires*” because “the FCC’s interpretation of its ancillary jurisdiction reaches well beyond the agency’s delegated authority under the Communications Act”).

wireline broadband Internet access services from Title II of the Act, where Congress clearly intended them to be regulated, the Commission’s use of Title I authority to reach such services would be particularly questionable.³¹

In conclusion, COMPTTEL believes that it would be inappropriate for the Commission to grant the wide-sweeping relief requested by the UPLC. At the same time, UPLC raises important policy questions in its petition, and the Commission should issue a Notice of Inquiry regarding the appropriate regulatory classification of BPL services.

³¹ See *FCC v. Midwest Video*, 440 U.S. 689 (1979). In *Midwest Video*, the Court noted that “as the Commission has held, cable systems otherwise ‘are not common carriers within the meaning of the Act.’” *Id.* at 702 n.11. As such, the Court reversed the Commission’s decision to impose common carrier-like obligations on cable systems. *Id.* at 705. Although the Court had in the past approved of the Commission’s exercise of ancillary jurisdiction in *Southwestern Cable* and in *Midwest Video I*, the Court here noted that “[t]hrough the lack of congressional guidance has in the past led us to defer -- albeit cautiously -- to the Commission’s judgment regarding the scope of its authority, here there are strong indications that agency flexibility was to be sharply delimited.” *Id.* at 708 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), and *United States v. Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (Burger, C.J., concurring)). In the broadband arena, Congress clearly intended that the Commission utilize its Title II authority to regulate wireline broadband Internet access services – as indeed the Commission did for the three decades from the initiation of the *Computer Inquiry* proceeding through the adoption of the *Wireline Broadband Internet Access Order*. Much as the Court examined Congressional pronouncements in *Midwest Video* and *American Library Association* in finding the Commission’s exercise of Title I authority invalid, the Court would likely examine Congress’ (and the FCC’s) clear recognition that Title II applied to wireline broadband Internet access services and query why a radical change of course from Title II to Title I was appropriate. Because Congress expressly subjected broadband services to Title II, the Court might have a hard time concluding that Congress would authorize the FCC to ignore Title II and instead attempt to subject such services to Title I.

Respectfully submitted,

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